



December 15, 2017

VIA ECF

Hon. Michael A. Hammer, U.S.M.J.
U.S. District Court for the District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
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Newark, NJ 07101

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RE: *Merck & Co., Inc., et al. v. Merck KGaA,*
Civil Action No. 16-0266 (ES) (MAH)

Dear Judge Hammer,

This firm, along with Sidley Austin LLP, represents Plaintiffs Merck & Co., Inc. and Merck Sharp & Dohme Corp. (“Plaintiffs”) in the above-referenced matter. We submit this letter jointly with Blank Rome LLP and Debevoise & Plimpton LLP, counsel for Defendant Merck KGaA, Darmstadt, Germany (“Defendant”). Pursuant to the scheduling order entered September 8, 2017, the parties submit this joint letter regarding a fact discovery dispute that has arisen with respect to Defendant’s responses to Plaintiffs’ Requests for Admission (the “RFAs”).

STATUS

On September 26, 2017, Plaintiffs served ten RFAs on Defendant. On October 26, Defendant served its objections and responses. On the basis of various objections, Defendant neither admitted nor denied the six requests at issue in this letter, which are RFA Nos. 2, 4, 5, 6, 9, and 10. The parties have met and conferred regarding those objections, but are at an impasse as to whether Defendant must supplement its responses. The parties’ positions on this issue are set forth below. Plaintiffs’ requests and Defendant’s responses are attached hereto as Exhibits A and B.

I. Plaintiffs’ Position

In its pleading, Defendant admits that it has used “Merck” in the U.S. in ways that are “not consistent with the parties’ agreements.” *See, e.g.,* Answer to Complaint, Dkt. No. 8, filed April 14, 2016 (“Answer”) ¶¶ 41, 49, 50. Its defense in this action is not that it never breached the agreement, but that its breaches were “inadvertent” and “rare.” *Id.* In the words of defense counsel, Defendant is guilty of nothing more than “foot faults.” *See* Nov. 7, 2016 Tr. at 10:24-11:1, 26:9-12.

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Plaintiffs propounded ten RFAs to determine which uses of “Merck” Defendant believes were “foot faults” and which it believes were consistent with the parties’ agreement. For example, RFA Nos. 2 and 4 ask whether two specific uses of “Merck” in the U.S.—a tweet regarding an event in Chicago and a press release with a New York dateline—breached the parties’ agreement. Despite admitting in its Answer that it has, on unspecified occasions, violated the agreement, Defendant asserts that requests about specific uses of “Merck” impermissibly seek a “conclusion of law on an ultimate issue in the case.” Defendant provided the same non-response to RFA Nos. 5 and 6, which asked whether Defendant’s use of “Merck” or “Merck KGaA” in a way that is “intended to be viewed” in the U.S. “would be a breach.”

Defendant’s objections are improper. Federal Rule 36 expressly permits requests for admission such as these that seek “*the application of law to fact, or opinions about either,*” and multiple courts have compelled responses to RFAs that seek a party’s understanding about what the contract at issue means or how it should be applied to the facts of the case. *E.g., Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 194 F.R.D. 76, 80 (W.D.N.Y. 2000); *Lauter v. Anoufrieva*, No. CV 07-6811, 2009 WL 10672595, at *1 (C.D. Cal. Mar. 30, 2009); *see also Sigmund v. Starwood Urban Retail VI, LLC*, 236 F.R.D. 43, 46 (D.D.C. 2006) (“[I]t would be permissible for plaintiff to propound requests for admission relating to [defendant’s] interpretation of its management contract . . .”). This is true even when a party’s admission “would gut its case” and subject it to summary judgment. *Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 803 (3d Cir. 1992).

The fact that these questions would require judicial determination if Defendant does not admit them is not a basis to refuse to respond—that is the very purpose of requests for admission. *See* Fed. R. Civ. P. 36 Advisory Committee Notes; *Booth Oil Site Admin. Grp.*, 194 F.R.D. at 80. Rule 36 contemplates that the parties may be able to remove issues from the case and streamline the trial by sharing their understanding of how the agreement should be interpreted and applied. *See* Fed. R. Civ. P. 36 Advisory Committee Notes; *Booth Oil Site Admin. Grp.*, 194 F.R.D. at 80. This is especially important in this case, where Defendant admits that, at times, it has acted inconsistent with the parties’ agreement, but refuses to say when.

For the same reason, if Defendant disagrees with the precise wording of a request, it is not permitted to quibble with the phrasing and then refuse to respond. *See Paramount Fin. Comm’n, Inc. v. Broadridge Inv’r Comm’n Sols., Inc.*, No. CV 15-405, 2017 WL 495784, at *3 (E.D. Pa. Feb. 7, 2017). Rule 36 requires Defendant to offer its own definition of the relevant terms or otherwise qualify its admission or denial if that is what is necessary to provide a substantive response. Fed. R. Civ. P. 36(a)(4); *Lauter*, 2009 WL 10672595, at *2; *Rowe v. E.I. duPont de*

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Nemours & Co., No. Civ. 06-1810, 2008 WL 4514092, at *4 (D.N.J. Sept. 30, 2008). For example, Defendant claims that it is incapable of admitting that its uses of “Merck” in the U.S. would be a breach of the agreement because those uses might refer to Plaintiffs or be on stationery emanating from Germany—a narrow exception acknowledged by the agreements. Reservations such as these can simply be explained in Defendant’s response. They do not excuse Defendant from making a good-faith effort to provide a meaningful answer with respect to Defendant’s acts beyond those reservations.

Finally, Defendant’s refusal to respond to RFA Nos. 9 and 10, which seek further clarification of contentions Defendant already asserted in its Answer, are also unjustified. RFA No. 9 asked Defendant to admit that its uses of “Merck” have “not been intended to be viewed in the United States,” while RFA No. 10 asks Defendant to admit that its uses of “Merck” in the U.S. have been “rare.” Defendant objects that the word “rare” is ambiguous, and that the requests call for an unduly burdensome investigation of all Defendant’s uses of “Merck” in the U.S.

First of all, “rare” is Defendant’s own characterization of how frequently it has used “Merck” in the U.S: in its Answer, Defendant averred that “on rare, isolated occasions uses of ‘Merck’ in the U.S. that are not consistent with the parties’ agreements have been made.” Answer ¶ 41. To clarify the issues in dispute, RFA No. 10 simply seeks Defendant’s ratification of its assertion that its misuses of “Merck” have been “rare.” As Plaintiffs explained during meet and confer, Defendant should rely on its understanding of the term “rare,” as used in the Answer, when responding to RFA No. 10.

Second, no burdensome investigation is necessary to respond to either request. RFA No. 9 is about Defendant’s intentions; it does not require an assessment of all uses of “Merck.” And if Defendant had inadequate information to form a belief as to whether its uses of “Merck” in the U.S. were “inadvertent” and “rare,” it would not have said so in its Answer.

For these reasons, the Court should order Defendant to provide substantive responses to RFA Nos. 2, 4, 5, 6, 9, and 10 or deem those requests admitted.

II. Defendant’s Position

Plaintiffs’ Requests for Admissions (“RFAs”) Nos. 2, 4, 5-6, 9-10 are improper under Rule 36. Four of the six RFAs seek conclusions of law as to whether there has been, or would be, a breach of contract – a legal conclusion that goes to an ultimate issue in the case. (RFA Nos. 2, 4, 5 and 6). Third Circuit precedent is clear: requests seeking conclusions of law as to the ultimate issues are not appropriate.

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The RFAs also seek various admissions regarding Defendant's "use of Merck," but are all so vague, ambiguous, speculative and hypothetical that a clear, coherent and non-misleading response is not possible. (RFA Nos. 5, 6, 9, 10). They simply do not provide enough information for Defendant to concisely or adequately respond and, if forced to respond, would require Defendant to conduct time-consuming and burdensome investigations that would be entirely disproportionate to the needs of the case.

For these reasons, and as explained further below, Defendant respectfully requests that the Court deny Plaintiffs' request.

A. RFA Nos. 2, 4, 5, 6 Improperly Seek Legal Conclusions Going to An Ultimate Issue In The Case.

RFA Nos. 2, 4, 5 and 6 each ask Defendant to admit or deny whether Defendant has "breach[ed] . . . the 1970 Agreement," the contract that forms the basis of Plaintiff's breach of contract cause of action. *See* Complaint, Count Ten ("Breach of Contract").

	Plaintiffs' Request for Admission	Defendant's Objection
2	Admit that Defendant's use of "Merck" alone in the November 29, 2016 press release titled "FDA Accepts the Biologics License Application for Avelumab for the Treatment of Metastatic Merkel Cell Carcinoma for Priority Review," published from Darmstadt, Germany and New York, New York and attached hereto as Exhibit A is a breach of the 1970 Agreement.	Defendant objects to Request No. 2 on the grounds that it calls for a conclusion of law on an ultimate issue in the case, and Defendant further refers to its response to Request No. 1. ¹
4	Admit that Defendant's tweet from its @merckgroup handle dated June 4, 2017, which reads "The latest research in #BladderCancer will be presented today at #ASCO17. Visit us in Hall A starting at 8 a.m. CDT.," and which is attached hereto as Exhibit B, is a breach of the 1970 Agreement.	Defendant objects to Request No. 4 on the grounds that it calls for a conclusion of law on an ultimate issue in the case, and Defendant further refers to its response to Request No. 3.
5	Admit that Defendant's use of "Merck" on a stand-alone basis in a way that is intended to be viewed in the United States would be a breach of the 1970 Agreement.	Defendant objects to Request No. 5 on the grounds that it is overly broad, unduly burdensome, vague and ambiguous, sets forth an incomplete hypothetical and/or calls for speculation, and calls for a conclusion of law

¹ Defendant's objections to RFA No. 1 and 3, as incorporated in its response to RFA Nos. 2 and 4, deny that the Exhibits that are true and complete versions of the documents purportedly identified in the requests.

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		on an ultimate issue in the case.
6	Admit that Defendant's use of "Merck KGaA" without the geographic identifier "Darmstadt, Germany" in a way that is intended to be viewed in the United States would be a breach of the 1970 Agreement.	Defendant objects to Request No. 6 on the grounds that it is overly broad, unduly burdensome, vague and ambiguous, sets forth an incomplete hypothetical and/or calls for speculation, and calls for a conclusion of law on an ultimate issue in the case

As the Third Circuit has made clear, RFAs seeking legal conclusions that go to an ultimate issue in the case are not proper. *Langer v. Monarch Life Ins.*, 966 F.2d 786, 803 (3d Cir. 1992) (noting that RFA seeking admission of ultimate liability is properly objectionable); *see also Paramount Fin. Commc'ns., Inc. v. Broadridge Investor Commc'ns. Solutions, Inc.*, No. CV 15-405, 2017 WL 495784, at *6 (E.D. Pa. Feb. 7, 2017) (“[An] RFA that calls for a legal conclusion that is one of the ultimate issues of the case is properly objectionable.”); *United States ex rel. Bergman v. Abbott Labs.* 09-4264, 2016 WL2621669, at *3 (E.D. Pa. Jan. 15, 2016) (same); *McCarthy v. Darman*, No. 07-cv-3958, 2008 U.S. Dist. LEXIS 47549, at *9 (E.D. Pa. June 16, 2008) (same); *Wheeler v. Corbett*, 11-92, 2015 WL 4952172, at *4 (M.D. Pa. 2015) (RFAs inappropriate where they “frequently embraced multiple, independent propositions, many of which assumed the ultimate issues at dispute in this lawsuit”).

While Rule 36 does at times permit admissions that may require “the application of law to fact,” as Plaintiffs note, seeking legal conclusions that “go to the heart of the case” is not an application of law to fact. *See McCarthy*, 2008 U.S. Dist. LEXIS 47549, at *9 (E.D. Pa. June 16, 2008). Rather, responding would require Defendant to take an affirmative position on whether or not it breached the agreement. That would consequently require legal analysis of each element of a breach (including materiality and damages), which is far beyond the purpose of Rule 36. *Paramount Fin.*, 2017 WL 495784, at *6 (E.D. Pa. Feb. 7, 2017) (RFAs seeking admissions as to even one element of a breach of contract claim (i.e., materiality) are inappropriate); *Music Grp. Macao Commer. Offshore, Ltd. v. Foote*, No. 14-cv-03078-JSC, 2015 U.S. Dist. LEXIS 16743, at *5-6 (N.D. Cal. Feb. 10, 2015) (“although Rule 36 allows for requests applying law to fact, requests for admissions cannot be used to compel an admission of a conclusion of law . . . it would be inappropriate for a party to demand that the opposing party ratify legal conclusions that the requesting party has simply attached to operative facts”) (internal quotations and citations omitted). Further, the Court has not yet decided whether German or New Jersey law applies to the breach of contract claim, another reason Defendant cannot sufficiently respond.

None of the cases cited by Plaintiffs support a finding otherwise. *See Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 194 F.R.D. 76, 79 (W.D.N.Y. 2000)

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(allowing RFAs that sought admissions that (1) verbatim quotations from agreement were accurate and (2) certain provisions had a particular meaning, but not whether the agreement itself had been breached); *Lauter v. Anoufrieva*, CV 07-6811, 2009 WL 10672595 (C.D. Cal. Mar. 30, 2009) (no contract at issue; addressing various deficiencies in the party's RFA responses that were unrelated to legal conclusions); *Sigmund v. Starwood Urban Retail VI, LLC*, 236 F.R.D. 43 (D.D.C. 2006) (seeking admission as to the interpretation of specific obligations under an ancillary agreement between defendant and third parties; no breach of contract claim at issue; request denied).

Plaintiffs' attempt to recharacterize Count Ten of the Complaint, which alleges "breach of contract," as "just one element of the contractual issue" is without merit. If New Jersey law were to apply, the question of whether Defendant is liable for breach of contract *is* the ultimate issue in a breach of contract claim. Contrary to Plaintiffs' assertion, a statement by Defendant that it acted inconsistently with the agreement is not by itself proof of "breach of contract." See *IDT Corp. v. Unlimited Recharge, Inc.*, No. CIV.A. 11-4992 ES, 2011 WL 6020571, at *8 (D.N.J. Dec. 2, 2011) (Salas, J.) (to prove "breach of contract," "a plaintiff must show: (1) the existence of a contract, (2) a material breach of the contract by the defendant, and (3) damages resulting from the breach.") (citations omitted).

For the same reason, Plaintiffs' attempt to justify these improper RFAs by contending that Defendant has already conceded it "breached the agreement" and "that its breaches were 'inadvertent' and 'rare,'" must fail. Nowhere did Defendant ever indicate it has breached any agreement. See Answer ¶¶ 154-55 (denying allegations of breach). While Defendant did state in the Answer that it inadvertently used "Merck" inconsistent with the Agreement on occasion, as discussed above, this is far from admitting there was a breach of contract, which requires consideration of several other elements, including materiality and damages. MSD did not ask in their requests whether Merck engaged in conduct inconsistent with the Agreement; it asked whether there was a breach.

Plaintiffs request to compel answers or admissions in response to RFA Nos. 2, 4, 5 and 6 should be denied.²

B. RFA Nos. 5, 6, 9 and 10 Are Improperly Subject to Multiple Interpretations.

In addition, RFA Nos. 5, 6, 9 and 10 are all improper because they are so vague, ambiguous, speculative and hypothetical that they are subject to multiple interpretations. "A request for admission should be such that it could be answered

² Plaintiffs' attempt to compel answers in response to RFA Nos. 2 and 4 should also be denied on the independent basis that the exhibits they attached are not true and correct copies of the documents described in the requests. See Defendant's Response to RFA Nos. 1 and 3.

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yes or no. To compel answers to vague and indefinite questions capable of more than one interpretation and which require an explanation thwarts the purpose of Rule 36(a).” *Ebert v. Twp. of Hamilton*, No. CV 15-7331, 2016 WL 6778217, at *4 (D.N.J. Nov. 15, 2016). In particular, “if the request as stated cannot be answered in a straightforward manner because it contains speculative elements,” it is objectionable. *Booth Oil Site Admin. Grp.*, 194 F.R.D. at 81 (W.D.N.Y. 2000) (requests that include a “range of interpretive possibilities” and, “like a line of poetry, may be subject to multiple interpretations” are properly objectionable); *Zen Invs., LLC v. Unbreakable Co.*, No. 06-4424, 2008 U.S. Dist. LEXIS 78684, at *8-9 (E.D. Pa. Oct. 7, 2008) (“Any Request for Admission containing an ‘if . . . then’ proposition is grammatically inappropriate for Rule 36 because it would require the respondent to assume facts in dispute.”). Where a request seeks an admission to an incomplete hypothetical, it is likewise objectionable. *See, e.g., Duchesneau v. Cornell Univ.*, No. 08-4856, 2010 U.S. Dist. LEXIS 111546, at *10-12 (E.D. Pa. Oct. 19, 2010) (RFA failed to provide sufficient facts to allow for an answer); *Evans v. Tilton*, No. 1:07-cv-01814-DLB (PC), 2010 U.S. Dist. LEXIS 47328, at *10-11 (E.D. Cal. Apr. 20, 2010) (RFA containing an incomplete hypothetical need not be admitted nor denied). As set out below, RFA Nos. 5, 6, 9 and 10 all suffer from these deficiencies:

RFA Nos. 5 and 6

5	Admit that Defendant’s use of “Merck” on a stand-alone basis in a way that is intended to be viewed in the United States would be a breach of the 1970 Agreement.	Defendant objects to Request No. 5 on the grounds that it is overly broad, unduly burdensome, vague and ambiguous, sets forth an incomplete hypothetical and/or calls for speculation, and calls for a conclusion of law on an ultimate issue in the case.
6	Admit that Defendant’s use of “Merck KGaA” without the geographic identifier “Darmstadt, Germany” in a way that is intended to be viewed in the United States would be a breach of the 1970 Agreement.	Defendant objects to Request No. 6 on the grounds that it is overly broad, unduly burdensome, vague and ambiguous, sets forth an incomplete hypothetical and/or calls for speculation, and calls for a conclusion of law on an ultimate issue in the case.

In addition to seeking improper legal conclusions, RFA Nos. 5 and 6 are improper because they ask Defendant to opine on whether “Defendant’s use of Merck” or “Merck KGaA” would be a breach of contract, but do not provide enough facts for Defendant to actually do so. These are incomplete hypotheticals that would require an exorbitant amount of speculation to answer. Whether or not a breach has occurred depends on several factors in addition to “Defendant’s use of ‘Merck’” or “Merck KGaA,” including but not limited to the time period in which the use was made; which, if any, version of the parties’ coexistence agreement was operative at the time of the use; the medium on which the use was made; the surrounding text and

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images; the context of the use; the location of the use; and whether the use was material.

To state just a few examples: The use of “Merck” standing alone on an advertisement in a journal would not be considered a breach of the 1970 Agreement if the journal originated from Germany and the use was made in 1976. The same use of Merck may be a closer question if it were made in another year or if the journal originated from another country (among several other factors that may change the analysis). Similarly, a use that might be a breach when in writing could very well be appropriate when used orally, depending on the context. And the use of “Merck” when used in the United States to refer to Plaintiffs, or when used to refer to the name of individuals, such Karl Merck, may be allowed under the agreement, regardless of the type of medium, while other uses may not. It is simply not possible for Defendant to answer these questions on the limited facts provided.

Plaintiffs do not disagree. Instead, they attempt to explain at length below why they are not interested in some of these uses and contend that “[r]eservations such as these can simply be explained in Defendant’s response.” This suggestion is not practical or proper. First, Plaintiffs’ explanations, which are conspicuously absent from Plaintiffs’ actual requests for admission, are precisely those that should not be necessary in an RFA in order for a respondent to answer them. *Paramount*, 2017 WL 495784, at *3 (“the Third Circuit Court of Appeals has stated that ‘[r]egardless of the subject matter of the Rule 36 request, the statement of the fact itself should be in simple and concise terms in order that it can be denied or admitted with an absolute minimum of explanation or qualification.’”) (quoting *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 967 (3d Cir. 1988)); *Ebert v. Twp. of Hamilton*, No. CV 15-7331, 2016 WL 6778217, at *4 (D.N.J. Nov. 15, 2016) (“To compel answers to vague and indefinite questions capable of more than one interpretation and which require an explanation thwarts the purpose of Rule 36(a).”). Second, Defendant would have to guess at the factors that Plaintiffs are actually interested in for each request, and the resulting response would be an in-depth list and legal analysis of every way Defendant could possibly use “Merck” or “Merck KGaA” in the United States. *See Zen Invs.*, 2008 U.S. Dist. LEXIS 78684, at *8-9 (E.D. Pa. Oct. 7, 2008) (“Requests for admission should not state ‘half a fact’ or ‘half truths’ which require the answering party to qualify responses.”).

To the extent Plaintiffs are using these RFAs to seek a comprehensive description of how Defendant could potentially use “Merck” in the United States, RFAs are not the proper vehicle to achieve that means. Among the over 60,000 documents produced by Defendant are numerous versions of name usage guidelines and other documents that address these issues in detail. RFAs cannot be a substitute for Plaintiffs’ review of the other broad swath of discovery it requested. *See Hayes v. Bergus*, No. 2:13-CV-4266-SDW-SCM, 2015 WL 5666128, at *6–7 (D.N.J. Sept. 24, 2015) (RFAs should be “surgical and should be used to eliminate issues over

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facts that are not in dispute, not to obtain discovery of the existence of facts, but rather are intended to establish the admission of facts about which there is no real dispute.”) (internal quotations and citations omitted); *K.C.R. v. Los Angeles*, No. CV 13-3806 PSG SSX, 2014 WL 3433772, at *3 (C.D. Cal. July 14, 2014) (“Where requests for admission . . . are unreasonably cumulative and duplicative of other discovery taken in the case, the requests do not serve the purpose of Rule 36(a)’ and are properly subject to objection.”).

The Court should deny Plaintiffs’ request with respect to RFA Nos. 5 and 6.

RFA No. 9

9	Admit that Defendant’s uses of “Merck,” other than as part of the phrase “Merck KGaA, Darmstadt Germany,” have not been intended to be viewed in the United States.	Defendant objects to Request No. 9 on the grounds that it is overly broad, unduly burdensome, and vague and ambiguous. Subject to and without waiving the foregoing objections, Defendant states that it can neither admit nor deny this request because it is not clear whether “uses of ‘Merck,’ other than as part of the phrase ‘Merck KGaA, Darmstadt Germany,’” includes uses contemplated under the 1970 Agreement, the 1975 letter amending such agreement, and any subsequent amendments. Defendant is neither able to admit nor deny this request also because it is overly broad and unduly burdensome and would require Defendant to identify, review and assess each use of “Merck” other than as part of the phrase “Merck KGaA, Darmstadt, Germany” and determine whether each such use was intended to be viewed in the United States.
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RFA No. 9 is also so vague, ambiguous, speculative and hypothetical that it is subject to multiple interpretations and cannot be answered. The RFA essentially asks Merck to admit or deny – with no limitation on the time period – whether each use it has ever made of “Merck” in the United States, other than as part of “Merck KGaA Darmstadt, Germany,” “has been intended to be viewed in the United States.” Whether Defendant “intends for ‘Merck’ to be viewed in the United States” depends entirely on the circumstance of each individual use and cannot be answered in one blanket response. Indeed, any attempt to respond would require Defendant to go back through each of its uses of “Merck” for an indefinite length of time. To the extent that is even possible, the effort would be unduly burdensome and disproportionate to the needs of this case. These RFAs cannot be answered concisely and are improper under Rule 36. *See also McCarthy*, 2008 WL 2468694, at *2 (RFAs that are “broad or nonspecific” and are not amenable to a “simple and concise” response are properly objectionable); *Paramount Fin.*, 2017 WL 495784, at *3 (“These RFAs contain no time period limitation and, therefore, are overly broad.”).

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Plaintiffs’ contention that “no burdensome investigation is necessary to respond” because “RFA No. 9 is about [Defendant’s] intentions” does nothing to limit this scope or address Defendant’s objections. The Court should deny Plaintiffs’ request for a response or admission in response to RFA No. 9.

RFA No. 10

9	Admit that Defendant’s uses of “Merck” in the United States, other than as part of the phrase “Merck KGaA, Darmstadt Germany,” have been rare.	Defendant objects to Request No. 10 on the grounds that it is overly broad, unduly burdensome, and vague and ambiguous. Subject to and without waiving the foregoing objections, Defendant states that it can neither admit nor deny this request because it is not clear what the term “rare” means in this context, or whether “uses of ‘Merck,’ other than as part of the phrase ‘Merck KGaA, Darmstadt Germany,’” includes uses contemplated under the 1970 Agreement, the 1975 letter amending such agreement, and any subsequent amendments. Defendant is neither able to admit nor deny this request also because it is overly broad and unduly burdensome and would require Defendant to identify, review and assess each use of “Merck” other than as part of the phrase “Merck KGaA, Darmstadt, Germany.
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RFA No. 10, similarly, is too vague, ambiguous, speculative and hypothetical to be capable of one interpretation and would once again require an unduly burdensome and disproportionate effort to respond. Defendant “uses” Merck in the United States in many different ways. Without more facts, Defendant cannot say whether each and every “use” has been “rare.” Even if there was only one possible interpretation of this request (which there is not), responding would require Defendant to review thousands of documents—again going back for an indefinite period of time—to attempt to locate such instances. This is simply not proportional to the needs of the case and not appropriate under Rule 36.

That Defendant used the word “rare” in its Answer is entirely inapposite. *See* Answer ¶ 41 (“on rare, isolated occasions, uses of ‘Merck’ in the U.S. that are not consistent with the parties’ agreement have been made inadvertently and that Merck KGaA diligently corrects such inadvertent errors when made aware of such”). Defendant’s Answer did not attempt to quantify every single “use” dating from the 1800s to the present in one sentence and cannot justify Plaintiffs’ overly broad and poorly drafted request. *See Paramount Fin.*, 2017 WL 495784, at *3 (“These RFAs contain no time period limitation and, therefore, are overly broad.”). Plaintiffs’ reference to Defendant’s Answer is taken out of context, and Plaintiffs’ request related to RFA No. 10 should be denied.

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For the reasons explained above, RFP Nos. 2, 4, 5, 6, 9 and 10 are all improper, and Plaintiffs' request should be denied. Nevertheless, in the event that the Court grants Plaintiffs' request, Defendant respectfully requests the Court to allow it to amend its responses rather than deem the RFAs admitted. *See, e.g., Rowe v. E.I. duPont de Nemours & Co.*, No. CIV.06-1810, 2008 WL 4514092, at *4 (D.N.J. Sept. 30, 2008) (denying motion to deem requests admitted and providing defendant opportunity to amend); *see also Davis v. Buckley*, No. 4:12-CV-78-TUC-JR, 2013 WL 12114581, at *1 (D. Ariz. June 11, 2013) ("the court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed.").

III. Plaintiffs' Reply

Defendant mischaracterizes the RFAs at issue in order to back away from its previous statements to the Court and avoid its obligation to respond to discovery. In reality, the RFAs are straightforward requests for clarification and confirmation of Defendant's position in this case. This Court should order Defendant to provide substantive answers, or deem the RFAs admitted.

First, contrary to what Defendant alleges, RFA Nos. 2, 4, 5, and 6 do not ask about the "ultimate issue" in the case. The "ultimate issue" is Defendant's liability to Plaintiffs. *Langer v. Monarch Life Ins.*, 966 F.2d 786, 803 (3d Cir. 1992) (noting that RFA seeking admission of ultimate liability is properly objectionable). There is a difference between breaching a contract and being ultimately liable on a contract cause of action. Breach merely requires a violation of one of the terms of the agreement. *See* Black's Law Dictionary (defining "breach" as "a violation" of an "agreement"). Ultimate liability for breach, in contrast, could require proving, among other things, that the violation was material, that plaintiff suffered damages, and that no affirmative defenses are applicable. *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007). These RFAs do not speak to any of these other elements and therefore do not reach the ultimate issue of liability.

If there were no difference between the act of breaching a contract and ultimate liability, and the question of breach was the "ultimate issue" in this case, there would be nothing for these parties to litigate. Defendant has already admitted that it breached the agreement in previous representations to this Court; that is what it means to act in ways that are "not consistent with the parties' agreements."

But because the act of breach is just one element of the contractual issue and Defendant has asserted a number of other defenses to the breach-of-contract cause of action, its answer to these RFAs will not determine the "ultimate issue" in this case. It will, however, facilitate the preparation of the case for trial by clarifying Defendant's position "as to the meaning and intent of particular contractual provisions." *Booth Oil Site Admin. Grp.*, 194 F.R.D. at 81; Fed. R. Civ. P.

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36(a)(1)(A). This is particularly important in this case, where Defendant admits it has breached, but will not specify the circumstances.

Second, Defendant incorrectly asserts that RFA Nos. 5, 6, 9, and 10 are subject to multiple interpretations and therefore impossible to answer. In so arguing, Defendant raises the specter of a series of allegations not at issue in this case. For example, this case is not about Defendant's use of "Merck" as an individual's surname or in reference to Plaintiffs. Likewise, this case is not about the no-longer-operative predecessor agreements to the 1970 Agreement, nor has Merck alleged any violations of the narrow exceptions regarding stationery and business cards set forth in the 1975 letter amendment. And this case is certainly not about Defendant's use of "Merck" in the 1800s. These are precisely the type of "hair-splitting distinctions" that may not be used to avoid a response. *See Paramount*, 2017 WL 495784 at *3.

Accounting for these distinctions in Defendant's RFA responses does not require an in-depth description of Defendant's interpretation of the contract. But Defendant should make a good-faith attempt to admit the answer even with any qualification it deems necessary, otherwise "a denial is a perfectly reasonable response" to an RFA. *Paramount*, 2017 WL 495784, at *2 (E.D. Pa. Feb. 7, 2017). What Defendant cannot do is raise narrow exceptions and then claim the request is too vague to answer.

Third, Defendant has no excuse for its refusal to ratify its previous statement that its unauthorized uses of "Merck" in the U.S. have been "inadvertent" and "rare." Answer ¶¶ 41, 50. Defendant claims these statements have been "taken out of context," but the statements were unambiguous. They reflect a theme repeated throughout Defendant's pleading and in its statements to this Court. Plaintiffs served this RFA to confirm Defendant's position in discovery, and Defendant is obligated to answer.

Thank you for your consideration.

Respectfully submitted,

s/John E. Flaherty

John E. Flaherty

cc: Counsel of Record (via email)